Supreme Court, U.S.
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No. 08-848

In the Supreme Court of the United States

JAMES E. MacEWAN,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari To The United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does the jurisdictional provision of the statute prohibiting receipt of child pornography, 18 U.S.C. §2252A, requiring that the prohibited materials have "been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer" extend to materials that were received over a channel or instrumentality of interstate commerce, the Internet, without proof that the materials crossed a state or national boundary?

2) Is denial of a hearing on a motion to vacate sentence under 28 U.S.C. §2255 error or an abuse of discretion when a *prima facie* showing has been made that trial and appellate counsel was ineffective by failing to conduct simple research concerning the elements of the offense and incorrectly advised a defendant that a constitutional challenge that had no chance of success had a prospect of success?

3) Is denial of a hearing on a motion to vacate sentence under 28 U.S.C. §2255 error or an abuse of discretion when the motion alleged specific facts giving reason to believe the defendant did not understand the nature of the proceedings and defendant offered to obtain a psychiatric examination at his own expense?

PARTIES AND RULE 29.6 STATEMENT

All parties are listed in the caption. There are no corporate parties.

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No. _____

In The
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James E. MacEwan,
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v.
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To The United States Court of Appeals
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OPINIONS BELOW

The Court of Appeals did not issue an opinion, but gave a brief statement of agreement with the District Court in its Order. (App., *infra*, 1a) The opinion of the District Court (App., *infra*, 2a-26a) is unofficially reported at 2008 WL 862396.

This is a Petition for Writ of Certiorari seeking review of a denial of an application for certificate of appealability, seeking to appeal the denial of a motion to vacate sentence filed under 28 U.S.C. §2255. The opinion of the Court of Appeals on direct appeal from the sentence (App., *infra*, 28a-56a) is reported at 445 F.3d 237. This Court denied petitioner's petition for writ of certiorari at 549 U.S. 882 (2006), Case No. 06-34. The opinion of the District Court in support of the underlying conviction (App., *infra*, 57a-63a) is unofficially reported at 2004 WL 3019316.

JURISDICTION

The Court of Appeals' judgment denying the application for certificate of appealability was entered on October 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1); *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 64a-67a.

STATEMENT OF THE CASE

This case addresses whether an individual may be convicted of possession of child pornography when there is no proof that the pornography traveled in interstate or foreign commerce under a statute which requires this. It also involves two issues of ineffective assistance of counsel: (1) failing to conduct simple research concerning the elements of the offense and incorrectly advising a defendant that a constitutional challenge that had no chance of success had a prospect of success, and (2) whether a defendant moving to vacate sentence under 28 U.S.C. §2255 is entitled to a hearing when counsel has stated reason to believe the defendant did not understand the nature of the proceedings and defendant offered to obtain a psychiatric examination at his own expense.

Jurisdiction of the United States District Court for the Eastern District of Pennsylvania was based on 28 U.S.C. §2255 and 18 U.S.C. §3231. Jurisdiction of the

United States Court of Appeals for the Third Circuit was based on 28 U.S.C. §§1291 and 2255. Petitioner filed his appeal to the Third Circuit on April 10, 2008 and a timely Motion for Certificate of Appealability on April 29, 2008.

Petitioner, James E. MacEwan, was sentenced on January 31, 2005 to the mandatory term of fifteen years imprisonment, plus a $100,000. fine and a $200. special assessment for two counts of violating 18 U.S.C. §2252A(a)(2)(B). On February 8, 2005 he appealed to the United States Court of Appeals for the Third Circuit. That court affirmed on April 5, 2006. New counsel filed a petition for writ of certiorari at No. 06-34, which was denied on October 2, 2006.

On August 14, 2007 counsel[1] for petitioner filed a Motion to Vacate Sentence under 28 U.S.C. §2255. It was denied on March 31, 2008 without a hearing. The order also stated there was no probable cause to issue a certificate of appealability. (App. 27a) Three judges of the Court of Appeals concurred on October 6, 2008. (App. 1a)

In 2003 petitioner was sentenced to five years probation for possession of child pornography in violation of 18 U.S.C. §2252(a)(1)(B). One of the terms of probation prohibited him from possessing child pornography and permitted the probation office to make random inspec-

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[1] The District Court mistakenly refers to a "*pro se*" motion to vacate sentence. All proceedings on the Motion to Vacate sentence were by counsel. A motion for discovery was filed after which the Government allowed counsel to review the materials in question. After that review, two issues raised in the Motion to Vacate were not pursued, because they lacked factual support. Nevertheless, the District Court addressed those issues.

tions of his computer. Two such inspections disclosed material stipulated to be child pornography.

Next, petitioner ordered five video tapes in response to a solicitation from an undercover postal inspector. At trial he entered a plea of guilty to the third count of the indictment, involving this, in violation of 18 U.S.C. §2252A(a)(2)(B). At the time of trial he was 70 years of age.

At trial petitioner's counsel stipulated that the materials found on his computer constituted child pornography. The District Court found the Government failed to prove the offenses charged in Count 1 took place within the statute of limitations, and acquitted petitioner of those charges. He was convicted of Count 2, charging a violation of 18 U.S.C. §2252A(a)(2)(B) despite the Government's failure to prove the movement of the pictures "in interstate commerce", as charged and as required by the statute.

The Government offered evidence that the Internet connection went from petitioner's home in Pennsylvania to a regional data center in Pennsylvania. The Government conceded there was no evidence in the record where the providers of child pornography were located, and that, as charged, simple possession was not enough. (C.A. Appx. 64-65) The Government relied on the intrastate use of the Internet to establish this element.

At trial, and on direct appeal, petitioner relied on decisions holding the power of Congress under the Commerce Clause did not extend to local activity not shown to have moved across state or national boundaries. The District Court ruled the local activity nevertheless substantially affected interstate commerce, and found petitioner guilty under Count 2.

In the Court of Appeals the Government argued the local Internet activity substantially affected interstate commerce, and that the admitted use of the instrumentalities and channels of interstate commerce was sufficient by itself to establish the jurisdictional element. The Court of Appeals affirmed on the second ground, the use of channels and instrumentalities of interstate commerce, and did not predicate its decision on the first.

Although the District Court states the Commerce Clause issue presented here was argued and ruled on in the Court of Appeals on direct appeal, it was not. The argument made by former counsel related to Congress' inclusion of the term "computer" in the jurisdictional provision. The Court of Appeals restated and rejected that argument in a footnote. 445 F.3d 244, n. 6. (App. 37a., n. 6)

REASONS FOR GRANTING THE PETITION

I. This case presents the important question of whether the federal statutes proscribing possession of child pornography shipped or transported in interstate or foreign commerce may be construed to exercise the full extent of Congress' power to regulate interstate commerce when this Court's decisions construe this language to be a limited exercise of the commerce power.

The power of Congress to regulate interstate commerce falls into three categories: (1) regulation of the channels of interstate commerce, (2) regulation and protection of the instrumentalities of interstate commerce, and (3) regulation of activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1 (2005) and cases cited. As presented in, and decided by, the District Court at trial, this case involved the question of whether the Government established conduct that was within the third part of this test. The Court of Appeals declined to decide the case on this basis, and affirmed on other grounds, concluding that the use of the Internet constitutes a channel or instrumentality of interstate commerce, so only its use need be proved. 445 F.3d at 244-245. (Appx., *infra* at 35a-42a). In doing this, the Court of Appeals followed cases addressing the extent of Congressional power, and not those which give the language "*in* interstate commerce" its meaning.

When faced with two plausible interpretations of a federal criminal statute, the alternative that does not impute to Congress an intent to use its full commerce

power to regulate conduct traditionally regulated by the States is followed. *United States v. Lopez*, 514 U.S. 549, 610 (1995). In interpreting a commerce regulation the terms "affecting commerce" and "involving commerce" indicate Congress' intent to regulate to the outer limits of its authority under the Commerce Clause. On the other hand, the term "in commerce" and "engaged in commerce" have a more limited reach. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115-116 (2001); *Ali v. Federal Bureau of Prisons*, ___ U.S. ___, 76 USLW 4057, 128 S.Ct. 831, 837, n.4 (2008).

The Federal child pornography statutes, 18 U.S.C. §2252A, before this Court, and 18 U.S.C. §2252 use the restrictive language "shipped or transported in interstate or foreign commerce". Congress knows how to create a criminal statute that extends to the full extent of its power to regulate interstate commerce: *E.g.*, 18 U.S.C. §1952, prohibiting interstate and foreign travel in aid of racketeering enterprises ("Whoever ... uses ... any facility in interstate or foreign commerce ..."); 18 U.S.C. §1958, prohibiting the use of interstate commerce facilities in the commission of murder-for-hire ("Whoever ... uses or causes another ... to use ... any facility of interstate or foreign commerce ..."); even 18 U.S.C. §1821, prohibiting the transportation of dentures under certain circumstances ("Whoever ... uses ... any instrumentality of interstate commerce ..."). Congress did not use that language in the child pornography statutes.

Allowing an interpretation that changes the meaning of commerce regulation beyond this Court's decisions and ordinary Congressional usage creates a departure from the accepted and usual course of judicial

proceedings. That interpretation should be reviewed by this Court.

II. The Court should consider the important question of whether a hearing must be afforded when a prima facie showing has been made that trial and appellate counsel were ineffective by failing to conduct simple research concerning the elements of the offense and incorrectly advised a defendant that a constitutional challenge that has no chance of success had a prospect of success.

James MacEwan was denied the effective assistance of counsel, in violation of his right to counsel guaranteed by the Sixth Amendment to the United States Constitution, because basic knowledge of commerce clause jurisprudence or simple legal research would have disclosed Mr. MacEwan would and should have been found not guilty of the charge of which he was found guilty. As explained in Point I, above, the restrictive language "in interstate or foreign commerce" required the government to prove the images moved across state lines or an international border.

Instead, trial and appellate counsel argued the Government had to prove the pornography actually crossed state lines, because constitutional limits on the commerce power so required. This is unsupportable because precedent is clearly to the contrary. *E.g.*; *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gonzales v. Raich*, 545 U.S. 1 (2005). Local activity is within the scope of the Commerce Clause if the channels or instrumentalities of interstate commerce are used or

affected, or the activities have a substantial relation to interstate commerce. On the other hand, this statute uses the language "in interstate or foreign commerce". Had counsel argued this limited exercise of the commerce power, Mr. MacEwan would have been acquitted of Count 2, because the Government admittedly did not prove the images crossed state lines.

In addition, petitioner was given erroneous legal advice concerning the chances of success of challenging the constitutionality of the mandatory minimum sentence prescribed for a second offense violation of 18 U.S.C. §2252A(a)(2)(B) required by 18 U.S.C. §2252A(b)(1). When a plea of guilty is entered on the advice of counsel, its voluntariness depends on whether that advice was within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52 (1985).

Trial and appellate counsel embarked on a course of action which inevitably resulted in at least the fifteen year mandatory minimum sentence that was imposed. As the Court of Appeals noted in its Opinion on direct appeal:

> "In arguing that the mandatory minimum provision of §2252A(b)(1) offends the Eighth Amendment, MacEwan cites no cases where any court has found that such a mandatory minimum non-lifetime sentence offends the Eighth Amendment. . . ." 445 F.3d at 247. (App. 44a)

No constitutional challenge to a mandatory minimum sentence has ever been successful in federal court. No such case was cited in any of the filings made on Mr. MacEwan's behalf, and research discloses there is no such case. No federal decision has ever held that a term of years which will likely result in the defendant dying

in prison constitutes cruel and unusual punishment, or is in any other way violative of the Constitution of the United States.

The District Court predicated its denial of relief on this issue on the ground that trial counsel for Mr. MacEwan advised him the argument had only a "'prospect' of success". (App. 17a) A prospect of success is not the same as no prospect of success. The effect of trial counsels' advice to plead guilty to Count 3 was that any acquittal or successful appeal of Counts 1 and 2, also charging a violation of 18 U.S.C. §2252A(a)(2)(B), was meaningless because of the same fifteen year mandatory minimum sentence required by the Count 3 guilty plea.

Failure to conduct research, or to find what even a quick search would reveal has been held to be ineffective assistance of counsel. *E.g.*, *United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007). The United States Court of Appeals for the Third Circuit appears to disagree with that principle in this case. This Court should address that apparent conflict between the Circuits, and consider this important issue of federal law.

III. The Court should consider the important question of whether a hearing must be afforded in a proceeding under 28 U.S.C. §2255 when counsel has stated reason to believe the defendant did not understand the nature of the proceedings and defendant offered to obtain a psychiatric examination at his own expense.

Petitioner was denied due process guaranteed to him by the Fifth Amendment to the United States

Constitution because there is reason to believe he was not competent to enter a plea of guilty, and the District Court should have allowed a hearing to give petitioner the opportunity to establish this.

The Motion to Vacate Sentence alleged that Mr. MacEwan did not know what was happening to him: he went from a guilty plea and a jury trial waiver through a trial he didn't understand. He did not know what was happening to him until he was convicted.

A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparation of his defense may not be tried or plead guilty. *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975); 18 U.S.C. §4241(a). Notwithstanding the District Court's reliance on the guilty plea and jury waiver colloquy, a conclusive determination of competence cannot be made on the basis of a defendant's responses to a colloquy or his demeanor at trial. *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

The colloquy in support of the guilty plea is not alone sufficient to resolve this issue. A hearing may be denied only when the allegations are vague or conclusory, are patently incredible or patently frivolous or false. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). In interpreting *Blackledge* as it did in this case, the United States Court of Appeals for the Third Circuit is in apparent conflict with the Fourth and Seventh Circuits: *United States v. White*, 366 F.3d 291 (4th Cir. 2004) and *Griffin v. United States*, 109 F.3d 1217 (7th Cir. 1997).

The assertions made in support of the Motion to Vacate Sentence are not vague or frivolous. New counsel interviewed petitioner, and doubted his understand-

ing of the proceedings that brought him to prison. His current attorney-in-fact reported Mr. MacEwan's lack of understanding of what happened at trial. Moreover, petitioner was and remains willing to incur the expense of an examination to determine if there is reason to proceed with this ground for release before examinations pursuant to 18 U.S.C. §4247 are initiated, and requested the District Court to allow this examination.

Denial of a hearing by the District Court was a departure from the accepted and usual course of judicial proceedings. Affirmance by the Court of Appeals for the Third Circuit created an apparent conflict with decisions of the Courts of Appeals for the Fourth and Seventh Circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

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January, 2009

Appendix

1) Decision of the United States Court of Appeals for the Third Circuit on Request for a Certificate of Appealability:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 08-2050
UNITED STATES OF AMERICA
v.
JAMES E. MACEWAN
(ED/PA Criminal No. 04-cr-00262-1)
CRIMINAL TREATED AS CIVIL

Present: McKEE, RENDELL AND SMITH, Circuit Judges.

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. §2253(c)(1), in the above-captioned case.

Respectfully,
Clerk

MMW/TRA/zm/mb

ORDER

The foregoing application for a certificate of appealability is denied. For substantially the same reasons given by the District Court, reasonable jurists would not debate whether the District Court was correct in denying MacEwan's claims as procedurally defaulted and/or without merit. See Miller-El v. Cockrell, 537 U.S. 322, 338 (200d) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

By the Court,
/s/ Marjorie O. Rendell
Circuit Judge

Dated: October 6, 2008

2) Opinion and Order of the United States District Court for the Eastern District of Pennsylvania denying Motion to Vacate Sentence:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 04-262
	:	
v.	:	
	:	CIVIL ACTION
JAMES E. MacEWAN	:	NO. 07-3369

MEMORANDUM

Baylson, J. **March 31, 2008**

I. Introduction

Presently before the Court is James MacEwan's ("Petitioner") Motion to Vacate his Sentence pursuant to 28 U.S.C. § 2255. On August 14,2007, Petitioner filed a pro se petition (Doc. No. 56) and a Memorandum of Law in Support drafted by Counsel. (Doc. No. 54). The Government filed a response on September 14,2007. (Doc. No. 58). For the reasons discussed below, the Court will deny the Motion without an evidentiary hearing.

II. Background and Procedural History

On May 6, 2004, Petitioner was charged with a three-count indictment for the receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(b)[1] (See Indictment 1-3).

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[1] Count One charged that MacEwan "knowingly received material that contained child pornography, as that term is defined in Title 18, United States Code, Section 2256(8), that had been mailed, shipped and transported in interstate commerce by any means, including by computer, that is approximately 1,068 graphic

On October 28, 2004, Petitioner waived his right to a jury trial, pled guilty to Count Three of the indictment, and proceeded to a bench trial before this Court on Counts One and Two. (See Govt. Resp. 5). Petitioner was represented by Ellen Brotman, Esq. ("Ms. Brotman") during his plea hearing and bench trial. (See id. at 2). This Court found Petitioner guilty of Count Two, but not guilty on Count One due to the Government's failure to prove that the receipt of the child pornography had transpired within the statute of limitations period. On January 31, 2005, this Court sentenced Petitioner to the statutory mandatory minimum sentence of fifteen years, or 180 months of incarceration, five years of supervised release, a $100,000 fine, and a $100 special assessment.[2] (See Petr.'s Mem. Supp. 6).

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image files which he downloaded from the Internet and stored on a Compaq Presario computer" in violation of 18 U.S.C. § 2252A(a)(2)(b). (Indictment 1).

Count Two charged that MacEwan "knowingly received material that contained child pornography, as that term is defined in Title 18, United States Code, Section 2256(8), that had been mailed, shipped and transported in interstate commerce by any means, including by computer, that is approximately 157 graphic image files which he downloaded from the Internet and stored on a Compaq Presario computer ... and approximately 96 graphic image files which he downloaded and stored on a Toshiba laptop computer" in violation of 18 U.S.C. § 2252A(a)(2)(b). (Indictment 2).

Count Three charged that Petitioner "knowingly received by mail material, specifically five videotapes that contained child pornography, as that term is defined in Title 18, United States Code, Section 2256(8), that had been mailed, shipped and transported in interstate commerce" in violation of 18 U.S.C. § 2252A(a)(2)(b). (Indictment 3).

[2] Petitioner was subject to enhancement sentencing due to the fact that he was on probation when he committed the crimes.

Petitioner filed a direct appeal, challenging his conviction under Count Two. (See Govt. Resp. 6). Petitioner argued: (1) Congress never intended to regulate receipt of child pornography that did not involve an interstate transfer, and (2) the fifteen-year statutory mandatory minimum sentence violated the Eighth Amendment. (See Petr.'s Mem. Supp. 2). The Third Circuit rejected both arguments, holding that (1) Congress did have the authority to regulate the receipt of child pornography not involving a transfer which crossed state lines, Congress did intend that Section 2252(A)(a)(2)(b) prohibit such conduct, and therefore the Government did not have to prove that any child pornography crossed state lines; and (2) the statutory minimum sentence did not violate the Eighth Amendment. See United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006).

On August 14, 2007, Petitioner, represented by new counsel, filed this Petition pursuant to 28 U.S.C. § 2255, claiming (1) ineffective assistance of counsel and (2) mental incompetence prevented him from entering a knowing and voluntary plea of guilty to Count Three and from knowingly and voluntarily waiving his right to a jury trial. (See Petr.'s Mem. Supp. 6). Petitioner has requested an evidentiary hearing.

III. Parties' Contentions

A. Petitioner's Contentions

Petitioner asserts that his plea of guilty to Count Three and waiver of a jury trial as to Counts One and Two were involuntary for five reasons. (See Petr.'s Mem. Supp. 3). First, Petitioner argues that Ms. Brotman er-

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Prior to this conviction, Petitioner was convicted of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). (See Govt. Resp. 1).

roneously advised him that a constitutional challenge to a mandatory minimum sentence had a chance of success, making his guilty plea to Count Three involuntary. (Id. at 5-8). Second, Petitioner argues that Ms. Brotman was ineffective by not challenging the interpretation of the statutory language of the jurisdictional element of 18 U.S.C. § 2252A. Id. at 7-8). Third, Petitioner asserts that his guilty plea and waiver of jury trial were improperly influenced through the coercion of his prior counsel and attorney-in-fact, Francis Miller, because Mr. Miller was a beneficiary of Petitioner's will. (Id. at 8-9). Fourth, Petitioner asserts that he was incompetent to stand trial and plead guilty. (Id. at 10). Fifth, Petitioner states in his pro se petition that discovery may reveal other grounds for his petition: namely that Petitioner was subjected to a potentially invalid anticipatory search warrant, and that Petitioner's counsel stipulated at trial that certain images constituted child pornography, but "the file does not reveal whether this was so." (See Pro Se Pet. 7).

B. Government's Contentions

The Government asserts that this Court should dismiss this petition because all claims asserted are without merit. (Govt. Resp. 7). First, the Government argues that Petitioner's claim concerning Ms. Brotman's advice on his chance of success has no merit. Petitioner himself has acknowledged that Ms. Brotman informed him that such argument had only a "prospect" of success. (Id. at 10-11). In addition, the Government argues that even if Petitioner was misadvised, the guilty plea colloquy corrected any error committed by Ms. Brotman. (Id. at 11). Moreover, the Government argues that Petitioner cannot demonstrate that the proceeding would have been different but for counsel's

errors due to the Government's overwhelming and incontrovertible" case as to Count Three. (Id. at 15).

Second, the Government argues that the record shows Petitioner's guilty plea and waiver of jury trial were not the product of coercion by Mr. Miller. (Id. at 17). The Government points out that although Mr. Miller was a beneficiary in the Petitioner's will for a 1935 automobile worth approximately $20,000-$30,000, there is no evidence that any advice rendered to Petitioner was motivated by a desire to keep costs low, or that pleading not guilty would have kept costs down significantly. (Id. at 19-20). The Government argues that entering the guilty plea was not in the best interests of either Mr. Miller or Ms. Brotman because it would result in a drain on the Petitioner's finances in the form of a criminal fine. (Id. at 20).

Third, the Government argues that there is no merit to the claim that Ms. Brotman was ineffective for failing to raise a proper Commerce Clause challenge. (Id. at 21-24) The Government argues that not only did Ms. Brotman challenge the interpretation of the statutory language of the jurisdictional element of 18 U.S.C. § 2252A, but that the Third Circuit rejected these arguments. (Id. at 23).

Fourth, the Government argues that Petitioner has not provided any indicia that he was incompetent at the time of his guilty plea and trial. (Id. at 24). Fifth, the Government asserts that Petitioner's claims as to the anticipatory warrant and trial counsel's stipulation are procedurally defaulted. However, if these claims are to be considered, the Government contends that the anticipatory warrant was "entirely proper in both its scope and execution" and that trial counsel's stipulation that certain images constituted child pornography

was proper because the illicit images in the case did constitute child pornography, as Petitioner himself admitted during his guilty plea to Count Three and through counsel during the bench trial. (Id. at 29).

IV. Standard of Review

"A prisoner in custody under sentence of a court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States. .. may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. A defendant, however, is entitled to relief under Section 2255 only if there are errors of law that constitute "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 426 (1962).

When a motion is made pursuant to 28 U.S.C. § 2255, the question of whether to order an evidentiary hearing is committed to the sound discretion of the district court. See, United States v. Day, 969 F.2d 39,41 (3d Cir. 1992). In exercising that discretion, however, the court must accept the truth of the Petitioner's factual allegations unless they are clearly frivolous on the basis of the existing record. Id. at 41-42. Further, a court shall grant a prompt hearing to determine the issues raised in the motion, unless the motion, files and records of the case conclusively show that the prisoner is entitled to no relief. Id. With respect to a claim for ineffective assistance of counsel, a hearing is required unless it is indisputable that counsel's conduct satisfied applicable standards. United States v. McCoy, 410 F.3d 124, 134 (3d Cir. 2005).

V. Discussion

This Court finds no need for an evidentiary hearing as the record conclusively establishes that Petitioner is not entitled to the relief sought in the petition. The Court has determined to deny the Petition without an evidentiary hearing for the following reasons, each of which will be discussed in more detail below:

1. As Defendant decided to plead guilty to Count Three, which carried a statutorily-required mandatory minimum sentence of fifteen years, which was the exact sentence imposed, after a thorough on-the-record colloquy, the Court rejects any claim that counsel was ineffective, or that there is any possibility that a hearing would reveal any prejudice to Petitioner given his unequivocal admission of guilt as to possession of child pornography.

2. As the trial judge who observed Petitioner on two occasions and thoroughly interrogated Petitioner on the record concerning his guilty plea, his waiver of a jury, and also heard from Petitioner at sentencing, I completely reject, as unfounded and contrary to the facts of record, any assertions that the Petitioner did not knowingly and voluntarily decide to plead guilty and waive a jury trial.

3. For the same reasons, the record clearly shows that Petitioner was competent to stand trial, alert, aware of the charges against him, aware of the minimum mandatory sentence, and had a full understanding of all of the proceedings leading up to the imposition of his sentence. When an on-the-record colloquy with the defendant reveals that the defendant was adequately advised of his rights and knowingly pled guilty, post-conviction allegations, contrary to the statements in

the record, do not require an evidentiary hearing. See discussion of case law below.

The trial was scheduled for October 28, 2004, at which time Petitioner was represented by Ms. Brotman, a very experienced defense attorney, who was accompanied by John Rogers Carroll, an exceptionally experienced criminal defense lawyer who was in the same firm as Ms. Brotman, and also by Mr. Miller, who was present but did not participate in the plea proceedings or the non-jury trial (although he did speak at the sentencing hearing).

Petitioner testified that he knew he was under oath, and that his answers to the questions must be truthful. He identified where he was, what he was charged with and that he was satisfied with his representation by counsel. (N.T.7-8). He was fully aware of the advice that his counsel had given to him, but unequivocally made it clear that his plea was his own decision. He had worked in business for a number of years. Although he was taking medication and had diabetes, there was nothing that would prevent his ability to understand what was happening and to participate in the proceedings. (Id. at 10).

At this point, the Court asked Ms. Brotman and she responded:

> THE COURT: All right. Ms. Brotman, based on your knowledge of the defendant do you believe that, as an officer of the Court, that there's any problem with proceeding today in view of any medical problems that Mr. MacEwan has?
>
> MS. BROTMAN: No, Your Honor.
>
> THE COURT: You've been able to communicate with him satisfactorily?
>
> MS. BROTMAN: Yes, Your Honor.

THE COURT: All right, thank you.

(Id. at 10-11)

As the Court had been advised that Petitioner wanted to plead guilty to Count Three, the undersigned read to him the charge in Count Three of the indictment. The Petitioner denied that anyone used any force, violence or threats to get him to plead guilty and that he was doing so of his own free will. On the topic of possible sentence, the following exchange took place:

> THE COURT: All right. Has anybody promised you - what kind of- what sentence you'll get from me? Go ahead, you may speak to Ms. Brotman.
>
> MS. BROTMAN: I think Mr. MacEwan is - we've have [sic] many discussions with Mr. MacEwan about the fact that this count carries a 15-year mandatory minimum as the law stands today.
>
> THE COURT: Okay.
>
> MS. BROTMAN: And so that's the sentence that I have discussed with him many times.
>
> THE COURT: All right. All right. Do you understand, Mr. MacEwan, that under the law if you plead guilty to this and I accept your plea, then I will have to sentence you to 15 years mandatory minimum imprisonment?
>
> MR. MacEWAN: Yes, sir.
>
> THE COURT: Do you understand that?
>
> MR. MacEWAN: I understand, sir.

(Id. at 23-24).

Petitioner also testified that he understood that by pleading guilty, he would be in violation of his probation (from an earlier conviction for the same offense) and could receive an additional sentence from the judge who had placed him on probation. (Id. at 25). He expressed his understanding of what would happen in connection

with the preparation of the Presentence Report, and when asked why he wanted to plead guilty, he said:

> "Why do I want to - it happened. I want to plead guilty for the simple reason that it actually happened, sir."

(Id. at 27).

Petitioner further indicated a full understanding of his constitutional rights and that he understood he would give up certain rights by pleading guilty. (Id. at 27-29). When the prosecutor read a summary of the facts that the Government would have proven if the case had gone to trial, Petitioner unequivocally stated that he admitted those facts. (Id. at 32). Before actually pleading guilty, the Court asked Petitioner "Do you still want to change your plea from not guilty to guilty as to Count Three? And he answered, Yes, sir." (Id.) At that point, the undersigned made the following finding:

> THE COURT: All right. I'm going to find the defendant is alert, competent and capable of entering an informed plea. That the plea is a knowing and voluntary plea supported by an independent basis of facts containing each of the essential elements of the offense plead to [sic]. I'll therefore accept the guilty plea, all right, on Count 3.

(Id.)

The Court then engaged in a further colloquy about Petitioner's intention to waive a jury trial as to Counts One and Two. When the Court posed a question to Ms. Brotman about whether she believed Petitioner was making a knowing and voluntary waiver of his right to a jury trial, Ms. Brotman replied, "Yes I do, Your Honor." The Court then made a finding that Petitioner's waiver of a jury trial was knowing and voluntary. (Id. at 36).

At this point, the Court heard argument and took the verdict under advisement.

At the sentencing hearing on January 31, 2005, several months after the guilty plea, Ms. Brotman was lead defense counsel, but Mr. Carroll and Mr. Miller were present along with Judy Hunt, the Probation Officer who interviewed Petitioner in connection with the preparation of the Presentence Report. A psychological report had been filed under seal.

None of these esteemed officers of the Court gave any indication that there had been any defect in the guilty plea proceeding, that Petitioner was incompetent to stand trial, or that he had any lack of understanding about the proceedings in which he had previously admitted his guilt to Count Three of the indictment. The Court would not have proceeded with sentencing if any of these esteemed professionals made any such suggestion. The fact that they did not make any such a suggestion at the time speaks volumes about the baseless nature of the Petition. There was argument on the constitutionality of the mandatory minimums, an argument that was subsequently raised on direct appeal, and rejected by the Third Circuit. Mr. Miller spoke about Petitioner's asset situation in terms of his ability to pay a fine. Before imposing sentence, the Court asked Petitioner whether he wished to make any statement and also ascertained that his attorneys would file an appeal for him. Petitioner stated:

> THE COURT: Ms. Brotman has filed an excellent brief on your behalf, setting forth some legal positions, and I just want to find out if there is anything you would like to say before I impose sentence? I mean, this is your opportunity to speak

if there's anything you'd like to say before sentence is imposed.

MR. MacEWAN: I just, I deeply regret my actions and I now come to realize that I do have an addiction. I would like to try to have it taken care of. And I say, I'm deeply sorry for everything.

THE COURT: All right, thank you, Mr. MacEwan.

(Id. at 8-9).

The undersigned was thoroughly satisfied at the sentencing hearing, as at the plea hearing and non-jury trial, that Petitioner was well-advised by competent counsel, that he exhibited full awareness of his surroundings and the nature of the proceedings, and he made no complaints of any kind. He acknowledged that he was satisfied with the services of his counsel. There was no suggestion of any conflict of interest of any kind by anyone. His decision to plead guilty was knowing and voluntary and he had no infirmity at the time he pled guilty or when he was sentenced. As a second offender on child pornography charges, with the quantity of evidence possessed by the government, Petitioner's decision to plead guilty to Count Three, and hoping the Court would impose no more than the minimum mandatory sentence of 15 years, was a rational choice.

A. The Court Does Not Need to Hold an Evidentiary Hearing

In considering a petition filed under § 2255, the Court has discretion to decide whether to hold a hearing, as long as the Court accepts as true all non-frivolous allegations in the petition. United States v. Dawson, 857 F.2d 923,927 (3d Cir. 1988). A hearing is only necessary when the record does not resolve factual allegations, such as in a situation where allegations

made by the Petitioner primarily relate to purported occurrences outside the courtroom of the undersigned, upon which the record can shed no light. See United States v. Jackson, 2006 WL 333833 at *7 (E.D.Pa. May 15,2006) citing Machibroda v. United States, 368 U.S. 487, 494-495 (1962) and United States v. Capisi, 583 F.2d 692, 695 (3d Cir. 1978). It is not uncommon for a Court to decide it has adequate information to dismiss a petition without conducting a hearing. See United States v. Ritter, 2002 WL 538980 at *2 (E.D.Pa. April 12,2002), aff'd 93 Fed. Appx. 402 (3d Cir. March 26, 2004), U.S. v. Arana, 2005 WL 3159669 at *4 (E.D.Pa. December 18,2001) and Jackson, 2006 WL 333833 at *7.

The Third Circuit has stated that in cases where a petitioner questions the efficacy of his counsel, "an objectively reasonable inquiry may obviate the need for such a hearing... Put differently, no hearings as to counsel's strategy are necessary in cases in which the conduct challenged is objectively reasonable, as courts can simply reject the claims on reasonableness grounds." Thomas v. Varner, 428 F.3d 491,501 n. 10 (3d Cir. 2005).

In deciding whether or not to have a hearing on a habeas petition, a judge's prior familiarity with a case is considered instructive. Jackson, 2006 WL 333833 at *7 citing McCarthy v. United States, 764 F.2d 28, 31 (1st Cir. 1985). This is particularly true in a matter such as the instant case, where a defendant raises collateral objections about whether his own decisions before the undersigned were knowing and voluntary- a subject on which the undersigned has personal knowledge. Id. (dismissing Petitioner's § 2255 petition regarding the voluntary nature of his plea without a

hearing where the Court had taken Petitioner's nolo contendere plea).)[3]

This Court holds that there is no need for an evidentiary hearing because the evidence of record conclusively demonstrates that Petitioner is not entitled to the relief sought and Mr. MacEwan has pointed to no evidence outside the record that could have bearing on his claim for relief.

B. Counsel Was Not Ineffective

In order to succeed on an ineffective assistance of counsel claim, a petitioner must prove that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "that the deficient performance prejudiced the defendant." Strickland v. Washington, 466 U.S. 668, 687 (1984). Under the first prong, "[t]he proper measure of attorney performance" is "reasonableness under prevailing professional norms." Id. at 688. This objective standard requires the reviewing court to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 669. Even if Petitioner establishes that counsel's conduct was "professionally unreasonable," the Sixth Amendment is not violated unless there is a reasonable probability that but for

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[3] In Jackson, Judge DuBois used language equally applicable in this case: "A hearing is necessary only where the record does not resolve factual allegations, such as in a situation where allegations relate primarily to purported occurrences outside the courtroom upon which the record can shed no light ... The Court, based upon the record in the case and the Court's extensive familiarity with Jackson's mental health history, concludes a hearing is not necessary to resolve the claims presented in Jackson's § 2255 Motion." Jackson, 2006 WL 333833 at *7.

counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

1. Ms. Brotman Did Not Erroneously Advise Petitioner to Enter a Guilty Plea With Respect to Count Three

"A habeas petitioner challenging the voluntary nature of his or her guilty plea faces a heavy burden." Zilich v. Reid, 36 F.3d 317, 320 (3d Cir. 1994). "A petitioner challenging the voluntary nature of a facially valid guilty plea based on unfulfilled promises or representations by counsel must advance specific and credible allegations detailing the nature and circumstances of such promises or representations." Id. at 320-21. When a defendant enters a plea of guilty on the advice of counsel, the voluntariness of the plea depends on whether there is a reasonable probability that, but for counsel's errors, the defendant would have proceeded to trial instead of pleading guilty. United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997). In Hill v. Lockhart, the Supreme Court held that the Strickland test applies to challenges to guilty pleas based on ineffective assistance of counsel. 474 U.S. 52,58 (1985). Thus, a guilty plea may be withdrawn based on ineffective assistance of counsel only if the Petitioner shows that: (1) his attorney's advice was under all the circumstances unreasonable under prevailing professional norms, and (2) he suffered sufficient prejudice from his counsel's errors. Strickland, 466 U.S. at 68.

Under the Strickland test, Petitioner has to show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill, 474 U.S. at 59. Petitioner argues that he relied on Ms. Brotman's advice that there was a chance of success in challeng-

ing the mandatory minimum sentence on appeal, and without this "reasonable prospect" of success he would not have pled guilty. (See Petr. 's Mem. Supp. 5). Petitioner, however, testified that he was fully aware that by pleading guilty to Count Three he would be subject to a mandatory minimum sentence of 15 years by the in-court guilty plea colloquy. The colloquy completely refutes his post-sentencing argument. (N.T.23-24).

The Third Circuit has "long held that an erroneous sentencing prediction by counsel is not ineffective assistance of counsel where ... an adequate plea hearing was conducted." U.S. v. Shedrick, 493 F.3d 292, 299 (2007) (finding that defense counsel's failure to advise defendant about potential upward departure did not prejudice defendant where defendant had participated in an in-court colloquy where the possibility of an upward departure in sentencing was discussed).[4] The Third Circuit explained that "[t]he plea colloquy is de-

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[4] See also, United States v. Jones, 336 F.3d 245, 254 (3d Cir. 2003) (holding counsel was not ineffective for allegedly promising defendant a sentence of "no more than 71 months" where defendant was advised in open-court colloquy of potential maximum sentence and there were no other promises regarding sentence); United States v. Mustafa, 238 F.3d 485, 492 (3d Cir. 2001) ("[A]ny alleged misrepresentations that [defendant's] former counsel may have made regarding sentencing calculations were dispelled when [defendant] was informed in open court that there was no guarantee as to sentence, and that the court could sentence him to the maximum."); Masciola v. United States, 469 F.2d 1057, 1059 (3d Cir. 1972) (per curiam) (holding that "[a]n erroneous prediction of a sentence by defendant's counsel does not render a guilty plea involuntary" where record demonstrates that a proper plea colloquy took place during which defendant acknowledged that he was aware of his maximum potential sentence).

signed to uncover hidden promises or representations as to the consequences of a guilty plea" and therefore, "declarations made under oath ought not to be lightly cast aside." Zilich v. Reid, 36 F.3d 317, 320 (3d. Cir. 1994). Moreover, "the representations of the defendant, his lawyer, and the prosecution at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Nonetheless, the burden is not "invariably insurmountable." Id., quoting Blackledge, 431 U.S. at 74-75.

Here, assuming arguendo that there were any erroneous predictions of success regarding the constitutionality of a mandatory minimum sentence, they were corrected by the in-court plea colloquy, which explained more than once that pleading guilty to Count Three imposed a mandatory minimum sentence of 15 years. (See N.T. 23-24). Given this record, Petitioner cannot now assert that he would not have pled guilty to a count that imposed this sentence without relying on the alleged advice of Ms. Brotman about the probable success of an appeal. Accordingly, the Petitioner's § 2255 petition as to this claim that counsel was ineffective is denied.

2. Petitioner's Commerce Clause Challenge Fails

"A prisoner may not use a § 2255 motion as a vehicle to relitigate an issue that has been raised on direct appeal." See United States v. Turner, 1999 WL 88937, at *1 (E.D. Pa. Feb. 22, 1999), citing United States v. DeRewal, 10 F.3d 100, 105 n. 4 (3d Cir. 1993). Petitioner's claim of ineffective assistance of counsel is also based upon his contention that his trial counsel failed to argue that the statutory interpretation of

"engaged in commerce" requires "actual proof of interstate commerce" in challenging Count Two. This issue, however, was raised on direct appeal by counsel and rejected. See United States v. MacEwan, 445 F.3d 237 (2006). On direct appeal, Counsel presented a twofold challenge to the jurisdictional element of 18 U.S.C. § 2252A(a)(2)(B): (1) statute requires the Government to prove images were transmitted interstate; and (2) the Government failed to prove beyond a reasonable doubt that the jurisdictional element was proven. The Third Circuit rejected both arguments and held that (1) Congress did have the authority to regulate the receipt of child pornography not involving a transfer which crossed state lines; and (2) Congress did intend that Section 2252(A)(a)(2)(b) prohibit such conduct, and therefore the Government did not have to prove that any child pornography crossed state lines. See MacEwan, 445 F.3d at 237.

Petitioner contends that, on appeal, his counsel should have focused on Congress's ability to regulate interstate commerce, rather than the "substantial impact" argument which was raised. See MacEwan, 445 F.3d at 245. Regardless of whether Counsel's commerce clause challenge fell outside reasonable professional standards, Petitioner cannot prove that the result of the proceeding would have been different had Counsel argued a different Commerce Clause challenge. The Third Circuit thoroughly and conclusively addressed all issues regarding this claim in its opinion and this Court may not re-litigate the issue.

3. The Stipulation Concerning the Images of Child Pornography Was a Valid Strategic Decision Made by Counsel

Petitioner argues in his pro se Petition, but not in his Memorandum of Law of Support, that counsel "stipulated at trial that all the images constituted child pornography, but the file does not reveal whether this was so." (See Pro Se Pet. 7). The Third Circuit has explained that "Strickland instructs [courts to] be deferential to counsel's tactical decisions, not to employ hindsight, and to give counsel the benefit of a strong presumption of reasonableness." Deputy v. Taylor, 19 F.3d 1485, 1493 (3d. Cir 1994). Therefore, "ineffectiveness will not be found based on a tactical decision which had a reasonable basis designed to serve the defendant's interests." Werts v. Vaughn, 228 F.3d 178, 190 (3d. Cir. 2000).

Here, Ms. Brotman stipulated that the images charged in Counts One and Two met the statutory definition of child pornography and that the files had been knowingly downloaded from the Internet. Petitioner does not specifically claim nor provide any additional facts as to how this stipulation created ineffective assistance of counsel. Furthermore, there is absolutely no evidence that Petitioner can demonstrate he suffered any prejudice under the second prong of Strickland. Thus, Petitioner's claim that Ms. Brotman's stipulation constituted ineffective assistance of counsel is without merit.

4. There is No Evidence that Mr. Miller Coerced Petitioner to Plead Guilty and Waive a Jury Trial Due to His Own Pecuniary Interests

A defendant can establish that a guilty plea is invalid by establishing that "an actual conflict of in-

terest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Where a defendant can show that his attorney had an "actual conflict," he need not satisfy the two-pronged standard of Strickland. Id. at 348. In order to establish an "actual conflict of interest," a defendant must show that his counsel advanced his own interest to the detriment of the defendant. Id. A lawyer's pecuniary interests alone, however, do not create an actual conflict of interest. United States v. Martinson, 1998 WL 111801 at *2 (E.D. Pa 1998). Therefore, a Petitioner asserting that an attorney's pecuniary interests led him to shirk his ethical obligation to provide dutiful representation of the client's Sixth Amendment claim is evaluated according to the stricter standard enunciated in Strickland. Id.

Petitioner has failed to set forth any adequate allegation demonstrating that his guilty plea was the result of Mr. Miller's alleged contlict. The record refutes Petitioner's claim that his counsel's conflict induced him to plead guilty.

Moreover, Petitioner cannot make a claim that he suffered prejudice under the second prong of Strickland because Petitioner does not and cannot assert that there is a reasonable probability that but for counsel's alleged coercion, Petitioner would have proceeded to trial on these charges. Strickland, 466 U.S. at 687-88. In fact, at his guilty plea hearing, in response to the Court's inquiry as to why petitioner was pleading guilty, Petitioner responded, "Why do I want to - it happened. I want to plead guilty for the simple reason that it actually happened, sir." (See Govt. Resp. Attach. A 24). See Parry v. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995) (treating the petitioner's failure to claim innocence or to express reluctance to plead guilty as a factor in deter-

mining that petitioner was not prejudiced by counsel's alleged error).

Next, Petitioner argues that Mr. Miller coerced Petitioner to waive his right to a jury trial, and thus his waiver was involuntary. A habeas Petitioner seeking relief from an involuntary jury waiver has the burden to show that the waiver was not intelligently, voluntarily, and knowingly made. Eaton v. City of Tulsa, 415 U.S. 697, 702 (1974).

When Petitioner waived his right to a jury trial, this Court fully explained what a waiver meant, what the right of a jury trial encompassed, and described how the jury would be chosen, what its role would be, and explained that its verdict would have to be unanimous in order for Petitioner to be convicted. (N.T.28). Moreover, Petitioner acknowledges in his petition that Mr. Miller only represented him at the preliminary hearing and Mr. Miller did not speak at trial. (See Petr's Mem. Supp. 7). Therefore, it is questionable if Mr. Miller could have influenced Petitioner's decisions, even if his pecuniary interest would have been best served in Petitioner's guilty plea.

c. Petitioner Was Competent at the Time of His Trial and Plea

Petitioner asserts that his substantive due process rights were violated because he was incompetent to stand trial and enter a guilty pica. Petitioner has never raised this claim before. A § 2255 Petitioner who fails to properly raise an issue at trial or on direct appeal will be procedurally barred from raising the issue in a collateral attack unless he can show cause and actual prejudice. See United States v. Frady, 456 U.S. 152, 167-68 (1982). "To show 'cause,' a petitioner must demonstrate that the reason for failing to raise

the issue is something that cannot be fairly attributed to him." United States v. Riddick, 15 F. Supp.2d 673, 676 (E.D. Pa 1998) (finding Petitioner's alleged lack of competency at trial due to drug use was procedurally barred because it was not raised). As the Government correctly points out, Petitioner never asserted at trial that he was incompetent, even after receiving an extensive psychological report.[5] (See Response 27). Nor does Petitioner demonstrate that failure to raise competency was due to something not attributable to him. Thus, Petitioner's claim that he was incompetent to stand trial is procedurally barred.

Furthermore, even if Petitioner was not procedurally barred from alleging incompetence, this Court holds that the record conclusively shows Petitioner was competent at the time of trial and that the Court need not hold a hearing to reconsider the issue. The colloquy shows Petitioner knew and understood the charges against him and had the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. He had a rational as well as a factual understanding of the proceeding against him. Godinez v. Moran, 509 U.S. 389,396 (1993) (discussing the competency standard for pleading guilty).

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[5] Although the Government has not specifically asserted that the competency claim is procedurally defaulted, the arguments in its Response indicates that the Government has raised the issue. Nonetheless, the issue of procedural default may be raised sua sponte by the Court. See cf. Smith v. Horn, 120 F.3d 400, 407-409 (3d Cir. 1997) (explaining that procedural default may be raised sua sponte by the Court of Appeals but it is inappropriate to raise the issue where "it is evident that a miscarriage of justice has occurred.") (internal citations omitted). There is no evidence of a miscarriage of justice here.

The only allegation of incompetence is the unsupported statement of the Petitioner's current attorney-in-fact who "questions [Petitioner's] understanding of the proceeding." (See Petr's Mem. Supp. 10). This lone statement does not provide the Court with an adequate reason to further delve into Petitioner's mental state at the time of his plea and his trial. Langston v. United States, 105 F. Supp. 2d 419, 423 (E.D. Pa 2000) ("If a defendant's mere allegations that [he] was incompetent to stand trial were enough to warrant an evidentiary hearing, an evidentiary hearing would be required in every § 2255 case in which competency is raised.").

Petitioner relies on two Supreme Court cases to support his argument that the Court must reconsider Petitioner's competence at the time of trial, but his arguments are unconvincing. Citing Drope v. Missouri, 420 U.S. 162 (1975), Petitioner states that "counsel's doubt about the defendant's competence is a factor to be taken into consideration in deciding to order an examination." (See Petr's Mem. Supp. 10). Relying on Pate v. Robinson, 383 U.S. 375 (1966), Petitioner reminds the Court that a conclusive determination as to competence cannot be made on the basis of Petitioner's responses to a colloquy or his demeanor at trial. However, Petitioner ignores that in both Pate and Drope, the issue of competence was raised before the trial court, not for the first time on collateral appeal. See Riddick, 15 F.Supp. 2d at 677 ("Failure of defense counsel to raise the competency issue at trial, while not dispositive, is evidence that defendant's competency was not really in doubt ..." quoting Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996).

In the instant case, neither Petitioner nor his experienced counsel ever raised his mental health

as an issue at his plea or his trial. The undersigned questioned Petitioner and Petitioner's attorney Ms. Brotman, at some length about many things, including Petitioner's mental state during the plea colloquy and expressly stated satisfactorily that Defendant was competent. (N.T.32) Thus, this Court holds that the mere unsubstantiated claim that Defendant is incompetent, alleged for the first time on collateral attack, when the undersigned was satisfied that Plaintiff was competent and well-represented by counsel at his plea and his trial, does not raise a legitimate claim of incompetence and the Court need not hold a hearing to consider the matter further.

D. The Anticipatory Warrant

Petitioner asserts that "examination of prior counsel's file reveals defendant was subjected to a search based on an anticipatory warrant, but the grounds for that do not appear." (See Pro Se Pet. 7). Petitioner provides no additional facts or explanation for the basis of this claim. The Court can only assume that Petitioner is attempting to assert a Fourth Amendment challenge to the use of an anticipatory warrant. First, the claim is procedurally defaulted because it was never raised before trial or at the trial or plea hearing. Second, assuming, arguendo, that the Court could reach the merits, Petitioner's claim fails. In United States v. Loy, the Third Circuit articulated the general principles governing anticipatory search warrants in the context of a child pornography investigation. 191 F.3d 360, 364 (3d Cir. 1999). Anticipatory warrants "which meet the probable cause requirement and specifically identify the triggering event are not per se unconstitutional." Id. The Third Circuit explained that "where the warrant application indicates that there will be a controlled

delivery of contraband to the place to be searched, the nexus requirement of probable cause is usually satisfied." Id. at 365.

Here, the alleged anticipatory warrant was based on a future controlled delivery of child pornographic videotapes to the Petitioner's residence. (See Govt. Resp. Attach. B). The Affidavit attached to the Warrant fully explained the "triggering event" and requested the permission to search the home of Petitioner after Petitioner took in the package containing the ordered child pornography videotapes into his home. (See Govt. Resp. Attach. B). Therefore, if the Court were to consider the merits, the anticipatory warrant was based on sufficient probable cause. The claim questioning the sufficiency of the warrant is dismissed.

VI. Conclusion

For the foregoing reasons, Petitioner's § 2255 Motion is denied in its entirety.

An appropriate Order follows.

3) Order of the United States District Court for the Eastern District of Pennsylvania:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 04-262
	:	
v.	:	
	:	CIVIL ACTION
JAMES E. MacEWAN	:	NO. 07-3369

ORDER

AND NOW, this 31st day of March, 2008, for the reasons set forth above, it is hereby ORDERED as follows:

1. The Petition for Writ of Habeas Corpus is DENIED without an evidentiary hearing.

2. There is no probable cause to issue a certificate of appealability.

3. The clerk of the Court shall close this case.

BY THE COURT:
s/ Michael Baylson
Michael M. Baylson, U.S.D.J.

4) Opinion of the United States Court of Appeals for the Third Circuit:

United States Court of Appeals,
Third Circuit.
United States of America
v.
James E. MacEwan, Appellant.
No. 05-1421.

Argued March 9, 2006.
Filed April 5, 2006.

Before ROTH and ALDISERT, Circuit Judges, and RODRIGUEZ,* District Judge.

ALDISERT, Circuit Judge.

This appeal primarily requires us to decide if the use of the Internet satisfies the interstate commerce element of the federal law prohibiting the receipt of child pornography, 18 U.S.C. § 2252A(a)(2)(B).[1] We hold that it does. The question is presented before this Court on defendant James E. MacEwan's appeal from a judgment of conviction and sentence entered on January 31, 2005, in the United States District Court for the Eastern District of Pennsylvania. MacEwan was convicted on two counts of violating § 2252A(a)(2)

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* The Honorable Joseph H. Rodriguez, Senior District Judge, United States District Court for the District of New Jersey, sitting by designation.

[1] The act punishes "Any person who ... knowingly receives or distributes ... any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer...." 18 U.S.C. § 2252A(a)(2)(B).

(B)[2] and, as a repeat offender of the federal anti-child pornography laws, received a 15-year sentence pursuant to the mandatory minimum sentencing provision of 18 U.S.C. § 2252A(b)(1). In addition to determining whether the jurisdictional nexus of § 2252A(a)(2)(B) comports with the Constitution and was satisfied in this case, we must also decide whether the 15-year sentence imposed by the District Court pursuant to the mandatory minimum sentence requirements of 18 U.S.C. § 2252A(b)(1) constitutes: (1) a violation of the Eighth Amendment prohibition on cruel and unusual punishment, (2) a violation of the separation of powers doctrine, or (3) a deprivation of due process under the Fifth Amendment. Jurisdiction was proper in the District Court pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1). For the following reasons, we will affirm the judgment and sentence in all respects.

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[2] We note initially that there appears to be a discrepancy between the crime charged in the indictment, the crime of conviction in the District Court's December 29, 2004 Memorandum Opinion and the crime of conviction listed in the Judgment. Count Two of the indictment, which is the focus of the present appeal, charges a violation of 18 U.S.C. § 2252A(a)(2)(B). The Judgment states that MacEwan was found guilty of violating 18 U.S.C. § 2252(A)(4)(B), which is not an actual offense. The Court's Memorandum Opinion states that MacEwan was charged with and is guilty of violating 18 U.S.C. § 2252A(a)(4)(B). We believe these discrepancies to be mere clerical errors that may be corrected by the District Court at any time pursuant to Rule 36 of the Federal Rules of Criminal Procedure. In any event, in their briefs, both parties correctly argued the merits of MacEwan's conviction under 18 U.S.C. § 2252A(a)(2)(B). The District Court should correct the judgment to state that MacEwan was convicted of violating 18 U.S.C. § 2252A(a)(2)(B), as that was the offense charged and that was the crime upon which evidence was admitted and considered.

I.

James MacEwan is a 71-year-old repeat offender of the federal laws prohibiting the distribution and receipt of child pornography. In 2001, prior to the present conviction for two counts of receiving child pornography in violation of § 2252A(a)(2)(B), MacEwan had been arrested for and later pled guilty to possessing child pornography in violation of § 2252(a)(1)(B). On January 30, 2003, he was sentenced to five years probation. Under the terms of his probation, MacEwan was prohibited from possessing child pornography, and his probation officer was permitted to make random inspections of his computer.

A.

Within little more than a year, MacEwan was found to have violated the terms of his probation three times, for which an indictment was returned on May 6, 2004. The indictment charged him with three counts of receiving materials containing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(B).

MacEwan was first discovered to have violated the conditions of his probation on July 16, 2003, when his probation officer made an unannounced visit to his home to verify his compliance with the terms of his probation. After inspecting MacEwan's computer, the officer found that MacEwan had been visiting child pornography websites. The officer then had the computer seized. Following further inspection, it was found to contain approximately 1,068 graphic image files of child pornography. This incident formed the basis of Count One of the 2004 indictment.

The second violation was discovered on October 9, 2003, when the probation officer made another unannounced visit to MacEwan's home. After inspecting two

other computers, the probation officer found links to child pornography websites. The two computers were then seized and later found to contain approximately 256 graphic image files of child pornography. This incident forms the basis for Count Two.

The third violation occurred on March 10, 2004, when an undercover United States Postal Inspector, posing as a letter carrier, delivered five videotapes containing child pornography to MacEwan's home. MacEwan had previously ordered these tapes from a catalogue sent by the government as part of an investigation into a global child pornography enterprise. MacEwan was selected to receive the catalogue solicitation because, during the course of the investigation, his name had previously been identified on a customer list for a child pornography website. After the videotapes were delivered and in MacEwan's possession, the Postal Inspectors then retrieved the videotapes pursuant to an anticipatory search warrant. This incident forms the basis for Count Three.

B.

On October 28, 2004, MacEwan entered a guilty plea to Count Three, but proceeded to trial on Counts One and Two. Following a bench trial held that same day, he was acquitted of Count One because the government failed to prove that he had received the image files that were the subject of that count within the applicable statute of limitations period. MacEwan was, however, found guilty of Count Two.

At trial, MacEwan had stipulated to the number of images charged in Counts One and Two, that they met the statutory definition of child pornography, and that the files had been knowingly downloaded from the Internet. He argued, however, that the government

could not establish that, in compliance with the interstate commerce jurisdictional element of § 2252A(a)(2)(B), there was an interstate transmission of the pornographic images. He contended that, absent proof to the contrary, the images could just as easily have traveled intrastate and that such an activity was beyond the reach of Congress under the Commerce Clause.

To support its argument that the images had traveled in interstate commerce, the government had James Janco, the manager of Comcast's Network Abuse Department, testify. Comcast was MacEwan's Internet service provider from December 2002 to October 14, 2003. Janco chiefly summarized the flow of data over the Internet and the routing of subscribers' website connection requests.

He stated that when a Comcast subscriber accesses the Internet from his home computer and requests a connection with a website, the connection would first originate from the subscriber's computer, pass through the cable modem—both of which are located in the subscriber's house—and then be sent to a regional data center. For West Chester, Pennsylvania, where MacEwan resided, Comcast's regional data center was located within Pennsylvania. The regional data center takes the subscriber's request, transfers it through various routers within the regional data center, then sends the request to the Internet backbone, which is a series of leased, commercial and private lines. Janco then stated that those lines take the subscriber's specific request and connect it to the server containing the desired website.

Comcast calls this process of accessing a website "Shortest Path First" ("SPF"). Under SPF, when the signal travels from the regional data center it will be

dynamically routed along the lines with the least volume of Internet traffic, rather than those covering the shortest geographical distance. In Janco's words: "[I]f the lines that [the request] would normally go within Pennsylvania are clogged or have a high amount of traffic on it, [the Internet backbone] would dynamically assign [the request] to another line connection and send it out of the shortest path first, what typically would be in the State of Pennsylvania in this case." (Trial Transcript, app. at 50-51.) Janco acknowledged, however, that if the Pennsylvania lines are full or too busy, the connection request could instead be routed through lines outside of Pennsylvania, even if the requested website were located on a server located within Pennsylvania. He stated that it was impossible to scientifically ascertain the exact path "any specific request, at a point in time would have done."[3] (*Id.* at 54.) Ultimately, however, the connection request would end up "wherever the server is physically located where [the subscriber] is trying to go." (*Id.* at 50-51.) This server could be located in Pennsylvania or anywhere else within the United States.

Before the close of trial, MacEwan made a motion for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. His motion contended that the government failed to prove the interstate commerce jurisdictional element of § 2252A(a)(2)(B) because there was no evidence presented at trial showing that the downloaded image files ever traveled outside of

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[3] Janco also stated that Comcast does not monitor data-routing traffic and thus does not possess any records that would indicate the specific route MacEwan's requests would have taken in accessing the child pornography websites. (Trial Transcript, app. at 66-67.)

the state of Pennsylvania. He also contended that, as for Count One, the government failed to prove beyond a reasonable doubt that the image files were received within the statute of limitations period for § 2252A(a)(2)(B).

In its Memorandum Opinion dated December 29, 2004, the trial court rejected MacEwan's Rule 29(a) motion on Count Two[4] and held that "the evidence which the government presented, that the images on the Defendant's computers were received through the internet, is sufficient to carry its burden of proof as to interstate commerce, and that it is not necessary to prove that the specific images were received from a source outside of Pennsylvania." (Opinion of the District Court, at 6.) It also rejected MacEwan's challenge that the jurisdictional prong of § 2252A(a)(2)(B) is beyond Congress' power in light of *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), and *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000). In so ruling, the District Court relied heavily on this Court's holding in *United States v. Rodia*, 194 F.3d 465 (3d Cir.1999),[5] which was decided after *Lopez*, but before *Morrison* and *Jones*.

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[4] The Court granted his Rule 29(a) motion on Count One, holding that the government failed to prove beyond a reasonable doubt that MacEwan received the images that were the subject of that charge within the applicable statute of limitations period.

[5] In *Rodia*, this Court held that Congress had the power to regulate the intrastate possession of child pornography under its Commerce Clause powers because such possession has a "substantial effect on interstate commerce." *Rodia*, 194 F.3d at 478-479. There, however, we were interpreting the jurisdictional element

C.

MacEwan's sentencing hearing was held on January 31, 2005, where the District Court determined that the enhanced sentencing provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650 (2003), effective as of April 30, 2003, applied to MacEwan because of his 2003 conviction for violating 18 U.S.C. § 2252(a)(1)(B). Pursuant to those enhancement provisions, MacEwan, as a repeat offender of Chapter 110 of Section 18 of the U.S.Code, was required to receive a minimum sentence of 15 years in prison. *See* 18 U.S.C. § 2252A(b)(1). MacEwan objected to the application of this mandatory minimum, arguing that it violates the Eighth Amendment prohibition on cruel and unusual punishment, the Fifth Amendment Due Process Clause right to an individualized sentence, and the separation of powers doctrine. The Court rejected these arguments and accordingly sentenced MacEwan to 15 years in prison with five years of supervised release. This appeal of both his conviction and sentence followed.

II.

MacEwan presents a twofold challenge to the jurisdictional element of 18 U.S.C. § 2252A(a)(2)(B). He first contends that it must be strictly interpreted to require the government to prove that the child pornography images were transmitted interstate; otherwise, he contends, the jurisdictional element unconstitutionally expands Congress' power under the Commerce

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of § 2252(a)(4)(B), not § 2252A(a)(2)(B). Accordingly, although the reasoning in *Rodia* may be persuasive in guiding our analysis of Congress' Commerce Clause powers, it is not controlling.

Clause to punish purely intrastate acts. Second, in what is essentially a sufficiency of the evidence challenge, MacEwan contends that the government failed to prove beyond a reasonable doubt that he met the jurisdictional element of § 2252A(a)(2)(B).

A.

We exercise plenary review over MacEwan's challenges to the interpretation and constitutionality of the interstate commerce jurisdictional element of 18 U.S.C. § 2252A(a)(2)(B). *See Rodia,* 194 F.3d at 469. Section 2252A(a)(2)(B) punishes "[a]ny person who ... knowingly receives or distributes ... any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer."

MacEwan faults the District Court for its broad holding that regardless of whether the images originated in Pennsylvania or out-of-state, the government showed that the images were downloaded from the Internet, which was "sufficient to carry its burden of proof as to interstate commerce." (Opinion of the District Court, at 6.) He contends that because the government could not conclusively prove that the child pornography images crossed state lines in their Internet transmission, he is therefore being punished essentially for his mere intrastate possession of child pornography. He then argues that § 2252A does not reach this activity, or, in the alternative, that if it did, Congress does not have the power under the Commerce Clause to punish those who possess child pornography that has not been transmitted interstate.

MacEwan is conflating "interstate commerce" with "interstate transmission" and confusing the nature of the jurisdictional basis for his charged of-

fense.[6] Nowhere in the statute does it state that the child pornography images must have crossed state lines; rather, it states solely that they must have been "transported in interstate ... commerce by any means, including by computer." *See Okeke v. Gonzales,* 407 F.3d 585, 593 (3d Cir.2005) (stating that we will give terms

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[6] MacEwan argues that "Congress' inclusion of 'computer' in [the § 2252A(a)(2)(B) jurisdictional provision] demonstrates that the internet was considered to be a possible method of interstate transport, but did not by itself constitute interstate transport." (MacEwan Br. at 17.) He then argues that "Congress['] intention to criminalize the use of a computer to transport prohibited images in interstate commerce prohibits a finding that the statute also criminalized the use of a computer to send images intrastate." (*Id.* at 17-18.) Had Congress intended for the meaning of the term "interstate commerce" to equate to the transmission of image files over the Internet, he argues that it would have so indicated. We disagree. When interpreting a statute, we are to endeavor to give the terms of the statute their ordinary meaning whenever possible. *Okeke v. Gonzales,* 407 F.3d 585, 593 (3d Cir.2005). Moreover, "[i]n construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *I.N.S. v. Elias-Zacarias,* 502 U.S. 478, 482, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (citation omitted). Congress' specific inclusion of the term "including by computer" denotes its special concern for the transmission of child pornography by electronic means. It defies sound reason to read this provision to exclude transmissions of child pornography over the Internet. The downloading of images from the Internet is synonymous with the transmission of images in interstate commerce by computer. *See infra.* To not so read the statute would render the term "including by computer" effectively meaningless. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (citations and quotations omitted) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). Accordingly, we reject MacEwan's reading of the statute.

of statutes their plain and ordinary meaning). With this distinction in mind, we must therefore analyze whether downloading an image of child pornography from the Internet (1) involves the receipt of something transported in interstate commerce, and (2) whether it is a constitutional exercise of Congress' power under the Commerce Clause to punish those who use the Internet to download such images.

1.

"The Internet is an international network of interconnected computers ... [and is comparable] to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Reno v. ACLU*, 521 U.S. 844, 850-853, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Moreover, as is evident from the trial testimony of the government's expert, unless monitored by specific equipment, it is almost impossible to know the exact route taken by an Internet user's website connection request, such as MacEwan's requests to connect with various child pornography websites. Because of fluctuations in the volume of Internet traffic and determinations by the systems as to what line constitutes the "Shortest Path First," a website connection request can travel entirely intrastate or partially interstate.

Regardless of the route taken, however, we conclude that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce. Here, once the images of child pornography left the website server and entered the complex global data transmission system that is the Internet, the images were being transmitted in interstate

commerce. To quote the Court of Appeals for the First Circuit in *United State v. Carroll*, the "transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." 105 F.3d 740, 742; *see United States v. Runyan*, 290 F.3d 223, 239 (5th Cir.2002) (same).

2.

That said, it is clear that Congress has the power to regulate the downloading of child pornography from the Internet. The Commerce Clause gives Congress power to regulate three types of activity: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce." *See Lopez*, 514 U.S. at 558-559, 115 S.Ct. 1624. Ignoring the first and second categories cited by *Lopez*, MacEwan proceeds to the third, and argues that because the government could not prove that the child pornography images traveled across state lines, the jurisdiction over his activity was only then created by his mere possession of child pornography. He then contends that, pursuant to *Lopez* and *Morrison*, Congress lacks the authority to regulate this activity because the mere *intrastate* possession of child pornography does not have a substantial impact on *interstate* commerce.

We disagree with this approach. In addressing the transmission of child pornography images over the Internet, we need not proceed to an analysis of *Lopez's* third category when Congress clearly has the power to regulate such an activity under the first two. *See United*

States v. Bishop, 66 F.3d 569, 588 n. 29 (3d Cir.1995) ("*Lopez* involved only a regulation that was justified, if at all, under Category Three [(the substantial effects test)] ... [a]s such, *Lopez* does not affect our analysis here [of Category Two]."); *compare with Lopez*, 514 U.S. at 559, 115 S.Ct. 1624 (proceeding to an analysis of congressional power under Category Three, where it was not argued that the first two categories applied); *Morrison*, 529 U.S. at 609, 120 S.Ct. 1740 (same). Indeed, it is difficult to find an act more intertwined with the use of the channels and instrumentalities of interstate commerce than that of downloading an image from the Internet. *See United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir.2004) ("Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact."). Accordingly, we are able to state conclusively that Congress' power under § 2252A(a)(2)(B) lies in its ability to regulate the channels and instrumentalities of interstate commerce.[7]

[7] By basing Congress' power to regulate the transmission of child pornography via the Internet under § 2252A(a)(2)(B) upon its power to regulate the channels and instrumentalities of interstate commerce, we avoid the necessity of revisiting our holding in *Rodia* by analyzing whether MacEwan's mere possession of child pornography that may have traveled wholly intrastate had a substantial impact upon interstate commerce as required by *Lopez's* Category Three. *See Rodia*, 194 F.3d at 473 (conducting such an analysis, as required by *Lopez*, as to whether the mere intrastate possession of such materials was something Congress could prohibit). Accordingly, insofar as the District Court premised its conclusions upon *Rodia*, we affirm on other grounds. *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 n. 1 (3d

3.

Having concluded that the Internet is an instrumentality and channel of interstate commerce,[8] it therefore does not matter whether MacEwan downloaded the images from a server located within Pennsylvania or whether those images were transmitted across state lines. It is sufficient that MacEwan downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce. *See Lopez,* 514 U.S. at 558, 115 S.Ct. 1624 (stating that Congress has the power to regulate an instrumentality of interstate commerce even though the "threat may come only from intrastate activities"); *Bishop,* 66 F.3d at 588 (holding that Congress has the power to regulate the instrumentalities of interstate commerce even though the wrongful conduct may occur wholly intrastate).

B.

At trial, MacEwan stipulated that he downloaded from the Internet the child pornography images that

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Cir.1983) ("An appellate court may affirm a result reached by the district court on different reasons, as long as the record supports the judgment.").

[8] Because the Internet is a worldwide communications system composed of an interconnected network of computers, data lines, routers, servers, and electronic signals, it is difficult to discern when the instrumentality component of *Lopez's* Category Two ends and the channel component of *Lopez's* Category One begins. We find no need to make a distinction between the two categories, however, because the Internet is both a channel of interstate commerce, *see Extreme Associates,* 431 F.3d 150, 161 (3d Cir.2005) ("The Internet is a channel of commerce covered by the federal statutes regulating the distribution of obscenity."), and, much like a bridge, railroad, highway, or airplane, it constitutes an instrumentality of interstate commerce, *see Bishop,* 66 F.3d at 588 (listing types of interstate instrumentalities).

were the subject of his conviction for Count Two of the indictment. Accordingly, in light of our conclusion that the government is not required to prove that the child pornography images crossed state lines before being downloaded and received by the defendant, but rather only must prove that the images were downloaded from the Internet, which is properly regulated by Congress as a channel and instrumentality of interstate commerce, it is beyond doubt that the government proved that MacEwan satisfied the jurisdictional element of § 2252A(a)(2)(B). *Cf. United States v. Kimler,* 335 F.3d 1132, 1138 n. 7 (10th Cir.2003) (stating that even if the ultimate source of the child pornography images was an intrastate distributor, the defendant's activity "would still be interstate if, as the evidence at trial established, he sent and received the images in interstate commerce over the internet"); *United States v. Hilton,* 257 F.3d 50, 54 (1st Cir.2001) ("[P]roof of transmission of pornography over the Internet or over telephone lines satisfies the interstate commerce element of the offense.").

III.

We next turn to MacEwan's challenges to his 15-year sentence. As part of an effort by Congress "to restore the government's ability to prosecute child pornography offenses successfully," the PROTECT Act amended § 2252A to provide increased punishment for repeat child pornography offenders. S.Rep. No. 108-2, at 1 (2003). The Act increased the mandatory minimum sentences for repeat offenders from five to 15 years. PROTECT Act, Pub.L. No. 108-12, § 103(b)(1)(E)(ii), 117 Stat. 650, 653 (2003) (codified as amended at 18 U.S.C. § 2252A(b)(1)). Effective as of April 30, 2003, the amended mandatory minimum sentencing provision now states that:

> Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. § 2252A(b)(1) (2004). Prior to the instant case, MacEwan had entered a guilty plea and was sentenced to probation for possessing child pornography in violation of 18 U.S.C. § 2252(a)(1)(B). His present conviction on two counts of knowingly receiving child pornography images in violation of 18 U.S.C. § 2252A(a)(2)(B) triggered the enhanced sentencing measures of the PROTECT Act.[9]

MacEwan contends that the 15-year mandatory minimum sentence required by § 2252A(b)(1) is unconstitutional because it violates the Eighth Amendment

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[9] We also note that even if we had not determined that Congress had the power under the Commerce Clause to regulate MacEwan's downloading of child pornography, he still pled guilty to Count Three of the indictment which also charged a violation of § 2252A(a)(2)(B) for his receipt, by mail, of five videotapes containing child pornography. Accordingly, regardless of our treatment of his conviction for Count Two, MacEwan would still be subject as a repeat offender to the mandatory minimum 15-year sentencing requirement of § 2252A(b)(1).

prohibition on cruel and unusual punishment, the separation of powers doctrine and the Fifth Amendment Due Process Clause right to an individualized sentence. We exercise plenary review over these constitutional challenges to the 15-year mandatory minimum sentence of § 2252A(b)(1). *See Rodia,* 194 F.3d at 469 (exercising plenary review over constitutional questions). We will deal with each contention in turn.

A.

MacEwan argues that the 15-year mandatory minimum sentence of § 2252A(b)(1) offends the Eighth Amendment as "cruel and unusual punishment," because it is grossly disproportionate to the offenses that MacEwan committed and is at odds with the "evolving standards of decency" that are a part of American society. *See Atkins v. Virginia,* 536 U.S. 304, 311-312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In arguing that the mandatory minimum provision of § 2252A(b)(1) offends the Eighth Amendment, MacEwan cites no cases where any court has found that such a mandatory minimum non-lifetime sentence offends the Eighth Amendment. We will therefore begin our Eighth Amendment proportionality analysis by examining the framework presented by the Supreme Court in *Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), and *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and our own court in *United States v. Rosenberg,* 806 F.2d 1169 (3d Cir.1986).

In *Ewing,* the plurality opinion[10] states that the "Eighth Amendment, which forbids cruel and unusual

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[10] Justice O'Connor wrote the plurality opinion, which Chief Justice Rehnquist and Justice Kennedy joined. Justices Scalia

punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" 538 U.S. at 20, 123 S.Ct. 1179 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-997, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment)). When evaluating proportionality challenges to sentences under the Eighth Amendment, courts must examine three factors: (1) "the gravity of the offense and the harshness of the penalty"; (2) "the sentences imposed on other criminals in the same jurisdiction"; and (3) "the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 290-292, 103 S.Ct. 3001. When conducting this analysis, this Court has recognized that we " 'should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.'" *Rosenberg*, 806 F.2d at 1175 (quoting *Solem*, 463 U.S. at 290, 103 S.Ct. 3001).

This principle of substantial deference therefore "restrains us from an extended analysis of proportionality save in rare cases." *Id.* (quoting *Solem*, 463 U.S. at 290 n. 16, 103 S.Ct. 3001). Consequently, in assessing such a challenge, the first proportionality factor acts as a gateway or threshold. If the defendant fails to show a gross imbalance between the crime and the sentence, our analysis is at an end. We, therefore, must focus upon whether MacEwan's is "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of

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and Thomas filed opinions concurring in the judgment, but stating that the Eighth Amendment contains no proportionality principle. *See Ewing*, 538 U.S. at 31-33, 123 S.Ct. 1179.

gross disproportionality." *Ewing*, 538 U.S. at 30, 123 S.Ct. 1179 (quoting *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J.)). If no such inference of gross disproportionality exists, then we are not bound to conduct any "comparative analysis 'within and between jurisdictions'" as required by *Solem*'s second and third factors. *Id.* at 23, 123 S.Ct. 1179 (quoting *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J.)).

1.

Turning to the first proportionality factor, we note that the Eighth Amendment does not demand strict proportionality between the crime and the sentence; rather, it forbids only those sentences that are "grossly disproportionate" to the crime. *Id.* at 23, 123 S.Ct. 1179. Indeed, "successful challenges to the proportionality of particular sentences should be exceedingly rare." *Id.* at 22, 123 S.Ct. 1179 (quoting *Hutto v. Davis*, 454 U.S. 370, 374, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam)). Here, the harshness of the 15-year mandatory minimum sentence is not premised purely upon the commission of the crimes charged in the 2004 indictment, but also upon the fact that MacEwan is a recidivist who has *previously* committed the crime of receiving child pornography. Indeed, the punishment of recidivism, as occurs in § 2252A(b)(1), "has long been recognized as a legitimate basis for increased punishment." *Id.* at 25, 123 S.Ct. 1179.

An appellant confronts a very high bar when challenging a sentence mandated by Congress as the minimum punishment for a recidivist offender. In *Ewing*, the Supreme Court upheld the California three-strikes law in the face of a challenge by a defendant who had received a mandatory sentence of 25 years to life for his

conviction of felony grand theft of three golf clubs. *Id.* at 28, 30-31, 123 S.Ct. 1179. The defendant had previously been convicted of four serious or violent felonies. *Id.* at 19, 123 S.Ct. 1179. In *Rummel v. Estelle*, the Court upheld a life sentence for a defendant who was convicted under a three-strikes law where the triggering offense was the obtaining of $120.75 by false pretenses and the appellant had committed two previous fraud felonies where the amount obtained was $80 and $28.36, respectively. 445 U.S. 263, 265-266, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). It was only in *Solem* that the Court ruled that a life sentence punishment for a recidivist offender violated the proportionality principles of the Eighth Amendment. 463 U.S. at 296-297, 103 S.Ct. 3001. There, the defendant—who had been convicted of uttering a "no account" check for $100, which is a felony, and had six prior minor and nonviolent felonies on his record—was appealing a life sentence without the possibility of parole. *Id.* In distinguishing its differing treatments of the defendants in *Solem* and *Rummel*, the Court noted that the defendant in *Rummel* faced the possibility of parole for his sentence, whereas the defendant in *Solem* could only petition for executive clemency, which is a vastly different and much more unpredictable system. *Id.* at 300-301, 103 S.Ct. 3001.

2.

Here, MacEwan is facing a 15-year mandatory minimum prison term that he received for violating federal anti-child pornography laws not once, but twice. His crimes were at least as serious as those committed by the appellants challenging their life sentences in *Rummel* and *Ewing*, which the Supreme Court upheld as constitutional. And, unlike the appellant in *Solem*, MacEwan's triggering crime is not "one of the most

passive felonies a person could commit," such as the utterance of a "no account" check for $100. *See Solem*, 463 U.S. at 296, 103 S.Ct. 3001. Moreover, the sentence received by MacEwan, unlike those received by the defendants in *Rummel* and *Solem*, is not a life sentence, but 15 years.[11] Indeed, in *United States v. Gross*, the Court of Appeals for the Seventh Circuit ruled that the

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[11] MacEwan attempts to inflate the magnitude and nature of his sentence, and cast it as a life term, by arguing that he is 70 years old and in bad health, and therefore cannot possibly hope to survive the 15- year term. (*See* MacEwan Br. at 34, 40.) In support of this argument he cites to *United States v. Martin*, wherein the Seventh Circuit ruled that it was an abuse of discretion for a district court to sentence a 45-year-old convicted of arson to 50 years in prison, which it found to be a *de facto* life sentence, where the statute did not authorize a life sentence as a penalty. 63 F.3d 1422, 1433-1434 (7th Cir.1995). Unlike the Seventh Circuit in *Martin*, however, we are dealing with a 15-year mandatory minimum sentence imposed by statute, not a statute allowing the imposition of any term of years except a lifetime sentence. MacEwan cites no cases indicating that a *de facto* life sentence created by a statutory mandatory minimum term of years is a violation of the Eighth Amendment.

We also cannot agree with MacEwan's attempts to cast his sentence as a punishment for an addiction in violation of *Robinson v. California*, 370 U.S. 660, 666-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (finding unconstitutional a 90-day sentence imposed for being addicted to narcotics). (*See* MacEwan Br. at 30-32, 40.) MacEwan might have a problem controlling his urges to view child pornography, but that is not what the statute is punishing. Unlike in *Robinson*, where the statute punished the status of being an addict, the statute here punishes one for repeatedly violating the federal laws prohibiting the receipt of child pornography. *Cf. United States v. Pena*, 125 F.3d 285, 287-288 (5th Cir.1997) (concluding that the statute at issue is not unreasonable where it punishes the violation of probation for using narcotics, not the defendant's addiction to narcotics).

15-year mandatory minimum sentence provision of § 2252A(b)(1) does not violate the proportionality principles of the Eighth Amendment where the defendant had been convicted of distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(B) and he had been convicted previously of sexual assault of a minor and lewdness with a minor. 437 F.3d 691 (7th Cir.2006).

MacEwan has repeatedly violated the federal anti-child pornography laws, and attempts to downplay the nature of those offenses by claiming that he is not a violent offender, or a trafficker in drugs or guns. We do not agree with this use of relativistic arguments to diminish the seriousness of his offenses. In evaluating the magnitude of the harm caused by child pornography, we defer to the findings made by Congress. The congressional findings underlying § 2251 repeatedly stress that child pornography "is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved." Child Pornography Prevention Act of 1996, Pub.L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996) (codified as amended at 18 U.S.C. § 2251).[12] Congress found that "where children

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[12] We discuss these congressional findings even though they were not made in relation to the recent 2003 PROTECT Act amendments to § 2252A(b)(1). The issues discussed in the congressional findings for the amendments to § 2251 discuss the harm caused by child pornography, which the PROTECT Act amendments were designed to directly combat. *See* S.Rep. No. 108-2, at 1 (2003) (stating that the PROTECT Act was designed to "restore the government's ability to prosecute child pornography offenses successfully"). This Court has held that we are able to examine congressional findings underlying other acts where the findings discuss a matter closely related to the issues underlying the presently analyzed law. *See* Rodia, 194 F.3d at 474 n. 4 (analyzing the congressional findings for the 1978 Protection of Children Against Sexual Exploitation

are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years." *Id.* Moreover, Congress found little distinction in the harm caused by a pedophile, be he a distributor or mere consumer in child pornography, because the mere "existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children." § 121, 110 Stat. at 3009-27. Furthermore, "it inflames the desires of ... pedophiles ... who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials." *Id.; see also New York v. Ferber*, 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

3.

In light of the heavy burden that an appellant must carry in order to show that his sentence is grossly disproportionate, it is clear that MacEwan's is not one of those rare cases where the gravity of his crime of conviction is so outweighed by the harshness of his sentence that we are led to reach "an inference of gross disproportionality." We therefore do not need to extend our Eighth Amendment proportionality analysis to an examination of the crimes committed and sentences received by other defendants in the federal and state ju-

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Act to better understand the amendments made by Congress in 1990 to § 2252).

risdictions.[13] See Rosenberg, 806 F.2d at 1176 ("Because we do not believe that this case warrants an extended eighth amendment analysis, we need not attempt to match defendants' sentences with the statistics."). Although we agree that the 15-year sentence is harsh, it was duly enacted by Congress as a punishment for those who had repeatedly taken illicit advantage of one of the most vulnerable segments of our society, its children. Accordingly, we conclude that the 15-year mandatory minimum sentence required by § 2252A(b)(1) for repeat child pornography offenders is not a cruel and unusual punishment in violation of the Eighth Amendment.

B.

MacEwan next argues that the mandatory minimum provision of § 2252A(b)(1) violates the separation of powers doctrine. He contends that by enacting a statutory mandatory minimum, Congress has "stripped the judiciary of its historic role in the sentencing process and has transferred that judicial power to the executive branch and deprived defendants and the public of the right to, and social benefits of, individualized sentences." (MacEwan Br. at 42.) He argues that this system, in effect, " 'unite[s] the power to prosecute and the power to sentence within one Branch' " because

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[13] In so ruling, we decline to examine the statistics that MacEwan has presented demonstrating the sentences prescribed by various state jurisdictions as punishment for the possession of child pornography. (*See* MacEwan Br. at 37 n. 3.) Furthermore, notwithstanding MacEwan's entreaties to the contrary, we also conclude that it is unnecessary for us to conduct a comparative analysis between the sentence received by an individual convicted of receiving child pornography a second time and the sentences received for those convicted of second-degree murder, kidnapping or rape. (*See id.* at 35-36.)

it vests power in the prosecutors to decide when to charge an offense triggering the mandatory minimum sentencing provision. (*Id.* at 44 (quoting *Mistretta v. United States*, 488 U.S. 361, 391 n. 17, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)).)

In considering MacEwan's argument, we must first address the nature of the separation of powers doctrine. In *Lujan v. Defenders of Wildlife*, the Supreme Court observed that "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." 504 U.S. 555, 559-560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Illustrating that common understanding, in *Eash v. Riggins Trucking Inc.*, this Court stated that the "first sentence of the Constitution expressly vests the legislative power in Congress, Art. I, § 1" and that "Congress through its Article I, Section 8 power to enact those laws that are 'necessary and proper' has the exclusive power to define offenses and to establish penalties." 757 F.2d 557, 573 (3d Cir.1985).[14] Conversely, in discussing prosecutors' powers, we have stated that "the decision whether or not to prosecute and what charges to file generally rests within the prosecutor's broad discretion." *United States v. Esposito*, 968 F.2d 300, 306 (3d Cir.1992).

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[14] In *Eash*, we were merely restating a maxim put forth almost two hundred years ago by the Supreme Court in *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812). Therein, the Court addressed the power of the judicial branch by examining the power granted by the legislative branch, stating: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34.

Turning now to the present dispute over mandatory minimum sentences, we note that the Supreme Court has specifically held that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). Moreover, it has observed that "determinate sentences were found in this country's penal codes from its inception ... and some have remained to the present." *Id.* (citations omitted). Similarly, this Court has also acknowledged our traditionally limited discretion in sentencing:

> While the pronouncement of sentence after a trial or a guilty plea may be an inherently judicial function, the proposition that specifying the sentence is an inherently judicial function is not supportable either by history or by the text of the Constitution. The Supreme Court has consistently recognized that Congress has plenary authority over the designation of appropriate punishment for federal crimes. *See United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978); *Ex parte United States*, 242 U.S. 27, 42, 37 S.Ct. 72, 74, 61 L.Ed. 129 (1916). The early practice was for Congress to prescribe specific punishments for specific crimes, and it was only much later that Congress delegated to the federal courts the broad discretion in sentencing which they have exercised in recent years. *Grayson*, 438 U.S. at 45-46, 98 S.Ct. at 2613, 98 S.Ct. 2610. The Supreme Court rejected the proposition that the power over sentencing is inherently judicial when it decided that Congress' delegation of the authority to determine release dates to the Parole Commission validly implied

> that the judge has no enforceable expectations with respect to the release date, short of the statutory term. *United States v. Addonizio,* 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). Likewise, this court in *Geraghty v. United States Parole Commission,* 719 F.2d 1199, 1208 (3d Cir.1983), *cert. denied,* 465 U.S. 1103, 104 S.Ct. 1602, 80 L.Ed.2d 133 (1984), squarely held that the legislation creating the federal parole board was not an impermissible delegation of an inherently judicial function. Thus, we hold that Congress may lawfully curtail judicial discretion in sentencing.

United States v. Frank, 864 F.2d 992, 1010 (3d Cir.1988) (addressing a similar contention that the Sentencing Reform Act of 1984 unconstitutionally stripped the federal courts of their traditional role in sentencing).

As for MacEwan's argument that the mandatory minimum provision of § 2252A(b)(1) vests too much power in prosecutors to decide the sentence of defendants via the charging of specific triggering offenses, we have held that it is "well settled that a legislature can exercise its right to limit judicial discretion in sentencing by bestowing on prosecutors the right to make decisions that may curtail judicial discretion." *Ehrsam v. Rubenstein,* 917 F.2d 764, 767 (3d Cir.1990) (rejecting appellant's argument that the Sentencing Guidelines vest an unconstitutional amount of discretion in prosecutors).

It is the Congress that has the power to define a crime and set its punishment. Notwithstanding that we judges may have imposed a lesser sentence in the case before us, and question the application of draconian mandatory minimum sentences in some cases, our jurisprudential hands are tied. The great Cardozo taught

us long ago: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921). Although we recognize that a host of inequities inhere in many large mandatory sentences, the relief must come from the legislative arm of government and not from the judges of the Third Article. Mandatory minimum sentencing provisions do restrict, or in some cases strip, the courts of the power to impose an individually-crafted sentence for a specific defendant; nevertheless, we cannot agree that the use of mandatory minimums violates the doctrine of separation of powers. Accordingly, we may not disturb Congress' power to define a sentence for a crime unless the sentence mandated for a crime offends the Constitution, i.e., is a cruel and unusual sentence or offends the Due Process Clause of the Fifth Amendment. *See Chapman*, 500 U.S. at 465, 111 S.Ct. 1919 (citations omitted) ("[A] court may impose, whatever punishment is authorized by statute for [an] offense, so long as that penalty is not cruel and unusual ... and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.").

C.

Finally, MacEwan argues that the mandatory minimum sentencing provision of § 2252A(b)(1) is unconstitutional because "the Due Process Clause dictates that [he] should have been the recipient of individualized sentencing in connection with the sentence to be imposed." (MacEwan Br. at 45.) We need not dwell upon this argument, however, because this Court has repeatedly held that there is no due process right to individualized sentences. *See Ehrsam*, 917 F.2d at 766 ("We reaffirm our previously expressed view that the

Due Process Clause permits mandatory sentences."); *Frank*, 864 F.2d at 1010. Rather, "[a] sentencing scheme providing for 'individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.'" *Chapman*, 500 U.S. at 467, 111 S.Ct. 1919. Accordingly, we determine that the 15-year minimum sentence mandated by § 2252A(b)(1) does not offend the Due Process Clause of the Fifth Amendment.

* * * * * *

We therefore hold that the Internet is both a channel and instrumentality of interstate commerce and that Congress can regulate the downloading of child pornography over the Internet under 18 U.S.C. § 2252A(a)(2)(B) even if the transmission never crossed state lines. Moreover, because MacEwan admitted that he downloaded the images from the Internet, sufficient evidence existed for a trier of fact to find the interstate commerce jurisdictional element of § 2252A(a)(2)(b) met beyond a reasonable doubt. Finally, we conclude that the 15-year mandatory minimum sentence of § 252A(b)(1) offends neither the Eighth Amendment prohibition on cruel and unusual punishment, the separation of powers doctrine, nor the Due Process Clause of the Fifth Amendment. We will affirm the conviction and sentence of the District Court.

5) Opinion of the United States District Court for the Eastern District of Pennsylvania:

In the United States District Court
for the Eastern District of Pennsylvania

United States of America — Criminal Action
No. 04-262

v.

James E. MacEwan

MEMORANDUM

Baylson, J. — December 29, 2004

The Defendant was indicted on May 6, 2004 and charged with three counts for the receipt of child pornography in violation of 18 U.S.C. § 2252 A (a)(4)(B). Count I charges that the Defendant received child pornography, between on or about January 30, 2003 and on or about July 16, 2003; "Count II charges that Defendant received child pornography, between on or about July 16, 2003 and on or about October 9, 2003;" and Count III charges that Defendant received child pornography on or about March 10, 2004.

This case was listed for trial on October 28, 2004 at which time Defendant pled guilty, without any plea agreement with the government, to Count III, and agreed to a trial without a jury on Counts I and II.

The testimony at the trial was exclusively presented by the government, following which Defendant moved for a directed verdict and then rested. John Sanderson testified that he was a probation officer supervising Defendant's probation following his conviction on a similar charge, and visited Defendant's home pursuant to a random computer inspection. The Defendant was not allowed to have child pornography

as a condition of his probation from his prior conviction. On July 16, 2003, at one of these visits, Mr. Sanderson, in the course of inspecting Defendant's computer, found child pornography on the computer in a file downloaded from the internet and maintained in a "my favorites" folder.

The government's next witness was James Janco of Comcast, a provider of computer services through cable networks. Mr. Janco manages the Comcast Network Abuse Department and testified that Comcast provided internet service to Defendant from 2002 through October 14, 2003 at Defendant's home at 954 Cornwallis Drive. The government presented this testimony in an effort to prove the Defendant received the images of child pornography found on his computer through interstate commerce. The statute under which Defendant is prosecuted requires that the child pornography which the Defendant is accused of receiving, "has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer. . ."[1]

Mr. Janco testified that when a computer user attempts to access the internet, the connection to the internet would originate from the consumer's computer, go through the cable modem, both of which are located in the customer's home, and the request would be sent to what Comcast calls a "Regional Data Center" which

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[1] Although there does not appear to be any dispute that the Defendant "possessed" the material, and this would itself subject him to conviction regardless of the dates of receipt, the government acknowledged that the indictment charges that the Defendant "knowingly received" the material and thus the government was obliged to prove that the material traveled in interstate commerce, and also the date of receipt. See N.T. at 52 53.

is a termination point for all connections of its subscribers in a general area. The Comcast Regional Data Center for Defendant is located in Pennsylvania:

> It takes the customer's request along with many other requests in that geographical area and it triages it to a number of different switches within that regional data center. In essence it's a transfer point, it's taking the request from the end user and ultimately sending it out to the internet.
>
> Q. And when you say sending it out to the internet, what does that entail?
>
> A. It entails receiving – sending within the regional data center the request from the, when we call universal broadband router, which is where the subscriber's modem would actually terminate, it would send it to another router, again we're still within the regional data center, ultimately it would, what we would call, hop to a core router, again within a regional data center and from that point, the request would be sent to the internet backbone, which is a series of leased, commercial and private lines.
>
> Q. And are those entirely within the state of Pennsylvania?
>
> A. No, they are not.

(N.T. at 37)

Mr. Janco testified that Comcast would send the message to the requesting server, whatever the internet site is that the user was trying to access . . . it isn't a direct telephone line, but rather based on what we call, shortest path first. . . ." (N.T. at 38). Mr. Janco testified that the message could be routed through other states and then come back to Pennsylvania. Mr. Janco testified that when a consumer logs on to an internet site, the

message could be routed anywhere the server is physically located. However, the Comcast records would not show for a particular date what route a message sent on Defendant's computer would have taken. On cross examination, Mr. Janco testified that he could not tell, as to the websites Defendant accessed during the time period of the indictment, where the servers for those websites were located or whether Defendant used any lines in accessing websites that went outside the state of Pennsylvania. (N.T. at 42-43).

Mr. Janco also testified that the use of the internet would not necessarily involve interstate traffic; although Comcast could possibly monitor the source and receipt of specific internet messages if it deployed intercept boxes on targets, such as in compliance with FISA orders. In the normal course of its business, Comcast does not monitor traffic and thus cannot tell whether specific traffic, in connection with a specific user's assessing a specific website, occurred in Pennsylvania or not. See N.T. at 54-55.

The government next called Donald Justin Price, an FBI agent with training in computer forensics who testified that a computer user who had certain web addresses, such as child pornography, in his, "my favorites" folder, would have to have taken affirmative action to place them there. The witness also examined the hard drives of the three computers seized from the Defendant. From his examination, Agent Price testified that he could determine the times and dates of the computer downloads by Defendant relevant to Count II of the indictment.

There was also a stipulation between the parties that as to Count II, the material was received within the dates charges and within the statute of limitations.

Thus, the statute of limitations argument of the Defendant only applies to Count I.

There were certain other stipulations between the parties, including that the images both charged in Counts I and II are images of child pornography and that the approximate number of images listed in each computer in Counts I and II are correct, and that Defendant was in knowing receipt of these materials. (N.T. at 49-50).

Following the government's evidence, the Defendant moved for a directed verdict and rested. (N.T. at 57-58). The parties thereafter submitted post-trial briefs and the matter is now ready for a decision.

The government contends that the facts proven are sufficient to show that the offenses were committed within the statute of limitations as to Count I. The Defendant disputes that the offense alleged in Count I was proven as committed within the statute of limitations. The Defendant also asserts that the government did not prove the interstate commerce nexus as to both Counts.

As to the statute of limitations issue, the Court finds that the government did not prove beyond a reasonable doubt that the offense charged in Count I of the indictment was committed within the period of the statute of limitations. There is no evidence as to when the material was received, and no evidence from which the Court can make an inference. Thus, the Court will grant the Motion for Judgment of Acquittal as to Count I. As to Count II, there is no dispute that the evidence is sufficient to show that the offense was committed within the statute of limitations.

With regard to interstate commerce, the parties and the Court have not found any Third Circuit case on

point. The leading cases on this issue appear to be U.S. v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997) and U.S. v. Runyan, 290 F. 3d 223, 249 (5th Cir. 2002), citing other decisions and holding that transmission of photographs by means of the internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce for purposes of 18 U.S.C. § 2251, as to which the interstate commerce requirement is identical to the statute under which the present indictment is brought. See U.S. v. Kimler, 335 F.3d 1132 (10th Cir. 2001) (dictum).

Numerous courts have held that the modern phenomenon of the internet is thoroughly connected to and part of interstate commerce. See, for example, American Book Sellers Foundation v. Dean, 342 F.3d 96 (2nd Cir. 2003), interpreting the "dormant commerce clause" (which protects against state regulations that erect barriers against interstate trade) and finding that internet usage is thoroughly part of interstate commerce. See, Note, The Dormant Commerce Clause and the Internet, 17 Harvard J. L. and Tech, 296 (2003).

The Court holds that the evidence which the government presented, that the images on the Defendant's computers were received through the use of the internet, is sufficient to carry its burden of proof as to interstate commerce, and that it is not necessary to prove that the specific images were received from a source outside of Pennsylvania.

The Defendant asserts that the Supreme Court's decisions in U.S. v. Lopez, 514 U.S. 549 (1995), U.S. v. Morrison, 529 U.S. 598 (2000) and Jones v. U.S., 529 U.S. 848 (2000) control, and that the federal jurisdictional requirement, that forbidden images must have been proven to have been transported in interstate

commerce, must be interpreted to require the government to prove the passage of child pornography across state lines. Without such proof, Defendant argues only the states may criminalize the receipt of pornography within state lines. However, even after Lopez, the Third Circuit held in U.S. v. Rodia, 194 F.3d 465 (3d Cir. 1999), cert. denied 529 U.S. 1131 (2000) that the statue under which Defendant is being prosecuted was a constitutional exercise of Congress' commerce clause power. This Court is bound by the holding in Rodia and therefore rejects Defendant's reliance on Lopez and its progeny.[2]

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[2] Cf. U.S. v. Maxwell, 386 F.3d 1042 (11th Cir. 2004) suggesting that Morrison requires reexamination of the holding in Rodia.

6) Constitutional Provisions Involved:

a) Article I, §8 of the Constitution of the United States:

> The Congress shall have the power
>
> * * *
>
> (3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> * * *

b) Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

7) Statutes Involved:

a) 18 U.S.C. §2252, in part:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * *

shall be punished as provided in subsection (b) of this section.

b) 18 U.S.C. §2252A, in part:

(a) Any person who–

* * *

(2) knowingly receives or distributes–

* * *

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

* * *

shall be punished as provided in subsection (b).

* * *

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military

Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

c) 28 U.S.C. §2253(c)(1):

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

d) 28 U.S.C. §2255(a) and (b):

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum

authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.